

CCA 202352018

Gift Consequences of Trust Modification (and/or early terminations) via consent or negative consent

<https://www.irs.gov/pub/irs-wd/202352018.pdf>

This Chief Counsel Memorandum addresses a trust modification via a petition, and the interested persons consented, to adding a power (to a grantor trust) to be able to reimburse the grantor for income taxes. State law did not allow for reimbursement of taxes.

The 5 pages of “nonsense” from the Chief Counsel’s office is just scary. I think that is what Carlyn McCaffrey said. People were upset that the CCA did not address the value of the gifts and thought that the thinking on failing to object went too far (a litigator friend actually agrees with the IRS).

As unhelpful as this CCA is in some respects, I think it does provide a fair warning to think about and also to disclose the tax ramifications of making changes to a trust or regarding early termination of a trust.

A few salient (maybe) comments or thoughts:

- The IRS said the result would have been the same even if the beneficiaries did not object (they still would have made a gift via negative consent)
- This was just giving the trustee the power to pay taxes and thus affect beneficial interests
 - The point being, what is the value of such a power? What is the value if trustee never exercises it?
 - The IRS did not see fit to address that question
- It was suggested that the way to deal with this is to get a valuation (and maybe value the gift at zero (of course, if that is actually the case)).

We have now started adding a provision to NJSAs regarding early terminations, that the beneficiaries are responsible for seeking advice on the tax implications of such acts and reporting such taxes. The Bank does not and has not provided tax advice related to this act. I am not sure this is good enough, but in smaller trusts maybe.... What is the value of a remainder interest in a \$100,000 trust (or less)? If you have a young current beneficiary (@37), then maybe less than the gift tax exemption? What is the risk to the Trustee B’s do not report gifts, or were not told specifically, etc..

